

Appeal from a decision of the Assistant District Manager, Las Vegas District Office, Bureau of Land Management, denying a petition for classification and rejecting desert land entry application N-57443.

Set aside and remanded.

1. Desert Land Entry: Applications--Desert Land Entry: Classification--Public Lands: Classification--Rules of Practice: Appeals: Jurisdiction

The Board of Land Appeals has no jurisdiction to consider appeals from BLM classification decisions. Nevertheless, it does have jurisdiction to determine whether a decision denying a petition to classify land as suitable for desert land entry is, in fact, a classification decision.

2. Desert Land Entry: Applications--Desert Land Entry: Classification--Public Lands: Classification

A BLM decision rejecting a desert land entry application will be set aside when the applicant counters the grounds for rejection with alleged facts, which if proved, would result in a different conclusion.

APPEARANCES: Bruce G. Perkins, Overton, Nevada, pro se; Mark R. Chatterton, Assistant District Manager, Las Vegas District Office, Bureau of Land Management, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Bruce G. Perkins has appealed the August 7, 1997, decision of the Assistant District Manager, Las Vegas District Office, Bureau of Land Management (BLM), denying his petition for classification and rejecting his desert land entry application N-57443.

On May 27, 1993, Perkins filed a desert land entry application pursuant to section 1 of the Desert Land Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1994), seeking approximately 160 acres of public land

described as lots 6 and 7 and the E $\frac{1}{2}$ SW $\frac{1}{4}$  sec. 6, T. 16 S., R. 68 E., Mount Diablo Meridian, Clark County, Nevada. He proposed growing hay or alfalfa on the 144 irrigable acres, using a sprinkler system with water pumped and piped from the Muddy River. Perkins indicated that he had year round rights to water from the Muddy River pursuant to State Permit No. 11632 (Certificate No. 4906), that he had applied for permission to change the point of diversion of the appropriated water for use on his desert land entry, and that the Nevada State Water Engineer was awaiting BLM approval of the desert land entry application prior to authorizing the transfer of the use of the water. He further asserted that BLM had issued him a right-of-way for a pipeline to transport the water from the new point of diversion to the lands included in his application. Perkins projected a net annual income of \$70,787 from the hay grown on the land.

Perkins' application form states at section 16 that if the land is not classified as suitable for desert land entry that his application should be considered a petition for classification of the land as suitable for desert land entry under section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315f (1994). 1/

In his August 7, 1997, decision, the Assistant District Manager denied the petition for classification and rejected the desert land entry for the following reasons:

The subject area is within an area that has been designated as Hydrographic Basin 220 (Lower Moapa Valley) by the State Water Engineer for which water applications have been denied. A soil evaluation was completed for the subject site, which has lead to a suitability determination of "poor." Further, significant populations of a rare plant taxa, three-corner milkvetch (Astragalus geyeri var. triquetrus) has [sic] been found on the subject site during a sensitive plant survey.

(Decision at 1.)

On appeal, Perkins challenges the validity of the reasons stated by BLM for issuing its decision. While agreeing that the State Water Engineer has denied water applications in Hydrographic Basin 220 (Lower Moapa Valley), Perkins claims that this fact has no relevance since he has surface water rights from the near-by Muddy River (Ex. A), as well as a pipeline right-of-way, issued by BLM, from his existing farm to the desert land entry site. (Ex. B.) He disputes BLM's conclusion that the soil is too poor for farming, asserting that he has proof that this same soil type can be and is very productive for farming purposes. Perkins attaches the statements of Donald L. Holloway, a Cooperative Extension Educator, and Craig Grow, a Clark County School District Farm Manager, opining that the sandy, loamy soil could, with water, be very productive land (Ex. C), soil

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1/ Classification under section 7 is a prerequisite to the approval of all public land entries, including desert land entries. See David V. Udy, 81 IBLA 58, 60 (1984).

test results for both the desert land entry site and a nearby productive farm confirming the similarity between the soils and terrain of the two tracts (Ex. D, p. 1-2), and photographs of the site and the productive farm lands. (Ex. D, p. 3-5.) He also objects to BLM's reliance on the existence of the three-corner milkvetch on the site as a basis for rejecting his application. He contends that he has never seen the plant on the land and that, even if the plant were there, it has not been listed as a threatened or endangered species and therefore cannot justify BLM's refusal to allow his entry. Perkins further complains that he has not been provided with copies of either the sensitive plant survey or the soil evaluation underlying BLM's decision. 2/

[1] In this case, BLM denied the petition for classification and rejected the desert land entry application in the same decision. In that decision, BLM advised Jenkins of his right to appeal the decision to this Board. It is well established in the Department, however, that the Board of Land Appeals has no jurisdiction to consider appeals from BLM classification decisions. See 43 C.F.R. § 4.410(a)(1); 43 C.F.R. § 2450.5(d); Pluess-Stauffer (California), Inc., 106 IBLA 198, 200 (1988); Duella M. Adams, 70 IBLA 63 (1983). Nevertheless, we do have jurisdiction to determine whether the decision in this case actually constituted a classification decision, and we conclude that it did not. Procedures for addressing petitions for classification are found in 43 C.F.R. Part 2400. BLM must adhere to those procedures in adjudicating a petition for classification. See Robert J. Proctor, 124 IBLA 263, 264 (1992).

In the same decision, BLM also rejected Jenkins' desert land entry application, a decision which is appealable to this Board. The grounds stated by BLM for denial of the petition and rejection of the application are the same. Therefore, we will examine those grounds to determine if they support rejection of Jenkins' application.

The case record contains a memorandum, dated June 28, 1996, in which a BLM employee stated that she reviewed Jenkins' desert land application and recounted that she "surveyed the area for sensitive plant species in 1995 and found significant populations of a rare plant taxa [the annual three-corner milkvetch] in the proposed area." She stated further that "[p]otential habitat for this species is shown in the attached map. This area is some of the best habitat for this species." 3/ She observed that

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2/ In an order dated Oct. 30, 1997, we granted Perkins' request for a stay and directed BLM to file an answer to this appeal. No answer has been filed. Instead, on Nov. 10, 1997, BLM submitted a document stating that it had no objection to the granting of the stay.

3/ The map accompanying the June 28, 1996, memorandum memorializing the survey does not show any of the actual plant population within the boundaries of the desert land entry. In fact, the boundaries of the areas searched, which are depicted by black lines on the map, do not overlap the boundaries of the land identified for entry. However, part of the entry lands are within an area outlined in pink marker and noted as "potential habitat."

conversion of the land to agricultural use might contribute to a need for the Fish and Wildlife Service to list the plant as threatened, and she recommended that the desert land entry application be rejected.

In an unsigned and undated report on soils, BLM stated that a BLM soil scientist evaluated the soils on the parcel by conducting an onsite investigation to ascertain the percentage of each soil type found and then utilized a "modified Storie Index Rating" to assess the parcel's potential utilization and productive capacity as irrigated farmland. BLM concluded in the report that the parcel's index rating was 39 (Grade 4 (poor) soil) and that its suitability for desert land entry was poor. <sup>4/</sup>

Under section 1 of the Desert Land Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1994), a person who has a right to the use of water based on a bona fide prior appropriation may apply for a desert land entry by declaring his intention to reclaim up to 320 acres of desert land by conducting water upon it. See Glen H. Wharton, 125 IBLA 165, 167 (1993). "Evidence of water rights, i.e., the 'right to the permanent use of sufficient water to irrigate and reclaim all the irrigable portion of the land sought,' is a vital prerequisite to the approval of a desert-land entry application." Patricia K. Scher, 59 IBLA 276, 278 (1981) (citation omitted). An applicant must demonstrate that, at the time of making application, he

has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States [such as Nevada] where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right.

43 C.F.R. § 2521.2(d); Glen H. Wharton, *supra*; Wesley A. Painter, 98 IBLA 69, 71 (1987). The applicable regulations also direct BLM to consider other factors, including the topography and character of the lands sought, when determining whether a desert land entry application should be permitted. See 43 C.F.R. § 2520.0-8(d)(3).

In this case BLM rejected Perkins' application because the State Water Engineer had denied water applications for Hydrographic Basin 220

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<sup>4/</sup> In an environmental scoping review of Perkins' application, a BLM resource specialist had the following comment on Feb. 14, 1994: "If water for irrigation is available no problem with soils." The same resource specialist later reviewed the soils report and by signature dated July 29, 1997, indicated his concurrence with its conclusions.

(Lower Moapa Valley), the soil within the entry had been evaluated as poor, and significant populations of the rare, but unlisted, three-corner milkvetch had been found on the site.

[2] Rejection of a desert land entry application will be set aside where an applicant has alleged facts which, if proved, would result in a different conclusion. See Norma J. Brown, 116 IBLA 158, 162 (1990); Leroy R. Davis, 107 IBLA 204, 207-208 (1989); David V. Udy, 81 IBLA at 63. Perkins has provided evidence indicating that he has sufficient water rights to support the entry and that the soil on the site is capable of being productive. He alleges that he has not seen the three-corner milkvetch on the land in question, and we find that the case record fails to support BLM's claim in its decision that "significant populations" of that species "have been found on the subject site."

BLM has not come forward to counter any of Perkins' arguments or evidence. We find that Perkins has provided information which, if proved, could result in a different conclusion, regarding his application. Accordingly, we set aside BLM's decision and remand the case for consideration of the evidence submitted by Perkins. If BLM again denies the petition and/or rejects the application, it should provide Perkins with copies of supporting documentation, as well as correctly advise him concerning his avenues for administrative review.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case is remanded for further action consistent with this opinion.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge